Supreme Court of the United States

OCTOBER TERM, 1960

No.

STANDARD DREDGING CORPORATION,
Appellant

versus

STATE OF ALABAMA,
Appellee

On Appeal from the Supreme Court of Alabama

JURISDICTIONAL STATEMENT

Eberhard P. Deutsch,
Hibernia Bank Building,
New Orleans 12,
Attorney for Appellant

Deutsch, Kerrigan & Stiles,
René H. Himel, Jr.,
Malcolm W. Monroe,
Of Counsel

CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Statute Involved	2
Question Presented	2
The Facts	3
The Question is Substantial:	5
1—The Commerce Clause	5
2—The Federal License	7
Appendix:	11
Opinion of the Supreme Court of Alabama	11
Judgment of the Supreme Court of Alabama	31
Decree of the Circuit Court	32
State Statute Involved	34

AUTHORITIES

Cases:

Ashwander vs Tennessee Valley Authority, 297 US 288 (1936)	7
Caskey Baking Co. vs Virginia, 313 US 117 (1941)	5
Cox vs Lott, 12 Wall. (79 US) 204 (1870)	7
Detroit Trust Co. vs The Barlum, 293 US 21 (1934)	4
Foster vs Davenport, 22 How. (63 US) 227 (1859)	7, 8
Freeman vs Hewit, 329 US 249 (1946)	5, 9

	Page
Gibbons vs Ogden, 9 Wheat. (22 US) 1 (1824)	7
Harman vs Chicago, 147 US 396 (1893)	7, 8
Huron Portland Cement Co. vs Detroit, 362 US 440 (1960)	8
Joseph vs Carter & Weekes Co., 330 US 422 (1947)	5, 6, 7
Los Angeles vs United Dredging Co., 14 F2d 364 (CA 9-1926)	7
McGoldrick vs Berwind-White Coal Mining Co., 309 US 33 (1940)	5
Michigan-Wisconsin Pipe Line Co. vs Calvert, 347 US 157 (1954)	2, 5, 6
Mitchell vs Blanchard, 272 F2d 574 (CA 5-1959)	5
Mobile County vs Kimball, 12 Otto (102 US) 691 (1881)	7
Moran vs New Orleans, 112 US 69 (1884)	7, 8
Railway Express Agency vs Virginia, 347 US 359 (1954)	2, 5
Ritch vs Puget Sound Bridge & Dredging Co., 156 F2d 334 (CA 9-1946)	5
Sinnot vs Davenport, 22 How. (63 US) 227 (1859)	7, 8
Spector Motor Service vs O'Connor, 340 US 602 (1951)	2, 5, 6
Western Live Stock vs Bureau of Revenue, 303 US 250 (1938)	5

Statutes:

Constitution of the United States:	
Article 1, Section 8	4
Article 3, Section 2	4
28 USC 1257(2)	2
46 USC 316	9

	Page
Code of Alabama, Title 51:	
Chapter 10, Section 140	1
Chapter 20, Section 496	2, 4
Texts:	
Barrett, "Substance" *vs.* "Form" in the Application of the Commerce Clause to State Taxation, 10 University of Pennsylvania Law Review 740 (1953)	6
Bernhardt, Negative Implications of the Commerce Clause, 11 Louisiana Law Review 482 (1951)	6
Note, 48 Columbia Law Review 773 (1948)	9
Note, 20 Fordham Law Review 217 (1951)	6
Note, 19 Tennessee Law Review 985 (1947)	9

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No.

STANDARD DREDGING CORPORATION,
Appellant

versus

STATE OF ALABAMA,
Appellee

On Appeal from the Supreme Court of Alabama

JURISDICTIONAL STATEMENT

Opinions Below

The Circuit Court of Montgomery County, the court of first instance, rendered no opinion. The opinion of the Supreme Court of Alabama, which has not yet been reported, is printed in the Appendix at page 11 *ff* below.

Jurisdiction

This suit was brought, pursuant to Section 140, Chapter 10, Title 51, Code of Alabama, for refund of a state

gross-receipts license tax. The judgment of the Supreme Court of Alabama, upholding the validity, under the Constitution of the United States, of the Alabama statute levying the license tax, was rendered and entered on June 30, 1960. The notice of appeal was filed with the Clerk of the Supreme Court of Alabama (which was possessed of the record of the case) on July 26, 1960. This court has jurisdiction of the appeal under 28 USC 1257(2). See *Railway Express Agency vs Virginia*, 347 US 359 (1954); *Michigan-Wisconsin Pipe Line Co. vs Calvert*, 347 US 157 (1954); *Spector Motor Service vs O'Connor*, 340 US 602 (1951).

Statute Involved

The appeal involves the validity, under the Constitution of the United States, of Section 496, Chapter 20, Title 51, Code of Alabama, which appears on pages 455-56 of the Alabama General Laws, 1935. The text of this statutory provision is set out in the Appendix at page 33 *ff* below.

Question Presented

Whether a state is not precluded, by the Commerce and Admiralty Clauses of the United States Constitution, and by proper federal licenses issued to the vessels involved, from imposing, by statute, a gross-receipts license tax on operations, under contract with the United States of America, carried out, by the use of vessels so licensed, exclusively in deepening a navigation channel which is an instrumentality of interstate and foreign commerce.

The Facts

Appellant is a New Jersey corporation, having its principal office in New York City. It has no office in Alabama. At all material times, appellant was duly qualified to do business, and was duly licensed to practice general contracting, in Alabama. R 20-21.

On April 29, 1953, appellant contracted with the United States, to deepen the navigation channel of Mobile Bay, which is an instrumentality of interstate and foreign commerce. R 20-21.

The dredging was performed during the period May 8-June 15, 1953, with the Dredge *Diesel*, her auxiliary vessels, the Tugs *Peter* and *Maryel*, and auxiliary barges.

The dredge and tugs were enrolled as vessels of the United States, and were licensed, by the Bureau of Marine Inspection and Navigation of the United States Department of Commerce, to engage in the coasting trade. R 21-22.

The vessels were brought to Mobile Bay from Texas, via the Gulf Intracoastal Waterway; remained afloat in Mobile Bay, navigating under their own power, at all times during execution of the contract; and, upon completion of the contract, departed Mobile for New Orleans via the Gulf Intracoastal Waterway. R 21.

This was appellant's only activity in Alabama during the period involved in this proceeding. R 21.

The State of Alabama assessed against appellant, under the provisions of Section 496, Chapter 20, Title 51, of the Code of Alabama, a contractor's license tax, computed on the basis of gross receipts, with respect to its stated operations. R 7, 93. Appellant paid the assessed tax, and sued for refund thereof in the Circuit Court of Montgomery County. R 4-6.

In its original bill of complaint, appellant averred that the Alabama statute, insofar as it authorized imposition of the tax, violated section 8 of article 1 (the Commerce Clause) as well as section 2 of article 3 (giving Congress exclusive jurisdiction over maritime matters[1]) of the United States Constitution. R 5-6.

The circuit court rejected appellant's constitutional objections (R 97), and upheld the statute under which the tax was levied as aforesaid; whereupon appellant appealed to the Supreme Court of Alabama. R 97-98, 99.

In its assignment of errors on that appeal, appellant again averred that the state statute authorizing imposition of the tax violated section 8 of article 1, and section 2 of article 3 of the United States Constitution. R 104.

On June 30, 1960, some 42 months after the case was argued, the Supreme Court of Alabama rejected appellant's constitutional objections (R 121, 128) and affirmed the circuit court's judgment (R 133); and this appeal followed.

[1] See *Detroit Trust Co. vs The Barlum*, 293 US 21, 43 (1934).

The Question is Substantial

1—*The Commerce Clause*

The improvement and maintenance of a navigable artery of interstate and foreign waterborne commerce, is itself interstate and foreign commerce. *Ritch vs Puget Sound Bridge & Dredging Co.*, 156 F2d 334 (CA 9-1946); *Mitchell vs Blanchard*, 272 F2d 574 (CA 5-1959).

Since this work constituted appellant's sole activity in Alabama, the gross-receipts license tax at issue was imposed for the privilege of carrying on interstate and foreign commerce exclusively; and this, as this court has steadfastly held, lies beyond the power of any state.[2]

The tax in suit is further objectionable, in that it is imposed directly on the gross proceeds from appellant's interstate-commerce activities. *Joseph vs Carter & Weekes Co.*, 330 US 422 (1947); *Freeman vs Hewit*, 329 US 249 (1946).

In support of the tax, the Supreme Court of Alabama cited *Western Live Stock vs Bureau of Revenue*, 303 US 250, *McGoldrick vs Berwind-White Coal Mining Co.*, 309 US 33, and *Caskey Baking Co. vs Virginia*, 313 US 117; emphasizing, in conjunction with quotations from

[2] *Michigan-Wisconsin Pipe Line Co. vs Calvert*, 347 US 157 (1954); *Railway Express Agency vs Virginia*, 347 US 359 (1954); *Spector Motor Service vs O'Connor*, 340 US 602 (1951).

these opinions, the geographically local nature of appellant's operation, and the non-discriminatory impact of the tax.

It is true that language can be found in these opinions, to support the proposition that a tax which does not discriminate against interstate commerce, or a tax which attaches to a local incident of such commerce not duplicated in any other state, may be valid.

But any definitive authority of these opinions for these propositions, does not seem to have survived *Calvert, Spector* and *Joseph*, all of which involved non-discriminatory taxes attaching to local incidents.[3]

The present rule of this court appears to be that no state may tax the privilege of engaging in interstate commerce, however non-discriminatory the tax, however local the taxable incident, unless "the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it". *Michigan-Wisconsin Pipe Line Co. vs Calvert*, 347 US 157, 166 (1954); see *Joseph vs Carter & Weekes Co.*, 330 US 422, 429 (1947).

---

[3] See Bernhardt, *Negative Implications of the Commerce Clause*, 11 Louisiana Law Review 482 (1951); and Barrett, *"Substance" vs. "Form" in the Application of the Commerce Clause to State Taxation*, 101 University of Pennsylvania Law Review 740, 741-42 (1953); Note, 20 Fordham Law Review 217, 218 (1951).

The courts below did not profess to find that the tax attached to any divorcible local incident of appellant's operation.

Rather, they sustained the tax on the ground that all of appellant's relevant operations, while in interstate commerce, took place within the boundaries of Alabama; in direct contradiction of this court's holding, in *Joseph vs Carter & Weekes Co.*, 330 US 422 (1947), that interstate commerce may not be taxed, even though it takes place entirely within the taxing state's confines.

2—*The Federal License*

As noted above, appellant's dredge, and her auxiliary tugs, were licensed by the United States to engage in the coasting trade.

The only function of appellant's dredge and her attendant vessels is to perform dredging operations, as in this case, on the navigable waterways of the United States. This work falls directly within the category of maritime[4] coastwise[5] commerce as comprehended by the Constitution of the United States.

No state has power to impose a condition precedent (*i.e.*, a license tax) on the exercise of these federal licenses.[6]

---

[4] *Gibbons vs Ogden*, 9 Wheat. (22 US) 1 (1824); *Mobile County vs Kimball*, 12 Otto (102 US) 691 (1881); *Ashwander vs Tennessee Valley Authority*, 297 US 288 (1936).

[5] *Cox vs Lott*, 12 Wall. (79 US) 204, 210 (1870); *Moran vs New Orleans*, 112 US 69 (1884); *Harman vs Chicago*, 147 US 396 (1893).

[6] *Gibbons vs Ogden*, *Moran vs New Orleans*, *Harman vs Chicago*, footnotes 3 and 4 *supra*; *Sinnot vs Davenport*, 22 How. (63 US) 227 (1859); *Los Angeles vs United Dredging Co.*, 14 F2d 364 (CA 9-1926).

In the companion cases of *Sinnot vs Davenport* and *Foster vs Davenport*, this court held that a vessel holding a federal license to engage in the coasting trade, may not be subjected by any state to a further condition or license to carry on such trade, even though the trade involved be entirely within the geographical limits of the state. 22 How. (63 US) 227, 244 (1859).

Similarly, in *Harman vs Chicago*, the vessels were employed only on the Illinois River within the city limits of Chicago; but a license tax on their operation was held void as an impairment of their federal coasting licenses. 147 US 396 (1893). And see *Moran vs New Orleans*, 112 US 69 (1884).

On this phase of the case at bar, the Supreme Court of Alabama relied on *Huron Portland Cement Co. vs Detroit*, 362 US 440 (1960), in which this court upheld the application to licensed ships, of Detroit's Smoke Abatement Code.

However, in the *Huron* case, this court expressly reaffirmed its holdings, cited above, that a federally-licensed vessel cannot be subjected to a state license tax, as a prerequisite to exercise of the privileges conferred by the federal license.

There is an obvious difference between state police measures directed toward public health or safety, and a mere revenue-raising license-tax; and the decisions sustaining the states' police power, have never been considered authoritative on the question of the right of

the states to tax either interstate commerce or federal licensees.[7]

The court below also remarked that "the tax incidence . . . is performance of the contract. The levy is not upon the means or machinery employed in doing the work. If Standard's vessels with maritime coasting licenses were used, such was by choice of Standard. Their incidental use in performing the contract cannot insulate Standard from the privilege license tax laid on such performance." R 128.

This argument can hardly withstand logical analysis, in light of the fact that the contract could be performed only by a dredge, with the aid of auxiliary vessels licensed for the coasting trade. 46 USC 316.

In any event, the court's comment is beside the point. If appellant had federally-licensed vessels to do the work, and chose to use them, the State could assess no additional license tax for such use of the vessels.

It is respectfully submitted that this case presents a substantial federal question, as to whether a state statute may, under the commerce and admiralty clauses of the federal constitution, validly authorize imposition of a gross-receipts license tax on the

[7] *Cf. Freeman vs Hewit*, 329 US 249, 253 (1946). "Traditionally, commerce cases have been considered separately in judicial treatment as to the state's ability to tax or regulate." Note, 19 Tennessee Law Review 985, 987 (1947). And see Note, 48 Columbia Law Review 773 (1948).

privilege of conducting operations, with vessels licensed by the United States to engage in the coasting trade, under a contract with the United States for deepening a navigable channel which is an instrumentality of interstate and foreign commerce.

Eberhard P. Deutsch,
Attorney for Appellant

Deutsch, Kerrigan & Stiles,
René H. Himel, Jr.,
Malcolm W. Monroe,
Of Counsel

August, 1960

Opinion and Judgment of the Supreme Court of Alabama

GOODWYN, JUSTICE.

This is an appeal by the Standard Dredging Corporation (herein referred to as Standard) from a decree of the circuit court of Montgomery County, in equity, sustaining an assessment made against it by the State for a contractor's license tax prescribed by § 496, Tit. 51, Code 1940. Our problem is to determine whether such license tax may validly be levied against Standard as a consequence of its acceptance and performance of a contract with the United States for maintenance dredging of the navigation channel in Mobile Bay.

Except for certain exhibits, and the testimony of one witness for the State (H.S. Phifer, Chief of the License Tax Division of the Department of Revenue) taken orally before the trial court, the facts were stipulated as follows:

> "1—Standard Dredging Corporation, which is engaged in business as a dredging contractor, is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey. Its principal office is maintained in New York City. In addition, the corporation maintains division offices in Los Angeles, California (West Coast Division), and New Orleans, Louisiana (Southern Division). A district office also is located in Galveston, Texas.

"2—The corporation's Southern Division, whose operations are supervised, directed and controlled from its division office at New Orleans, Louisiana, operates three hydraulic dredges (among which is the Dredge Diesel), with auxiliary vessels and attendant plant (among which are the Tugs *Peter* and *Maryel*), in the States of Tennessee, Arkansas, Texas, Louisiana, Mississippi, Alabama and Florida.

"3—During the entire period from October 1, 1952 through September 30, 1953 (the period for which the tax at issue herein was levied) said corporation was duly qualified to do business in the State of Alabama, paid its franchise taxes with respect to such period, and was duly licensed by the State Licensing Board of General Contractors to practice general contracting in Alabama.

"4—On or about April 29, 1953, Standard Dredging Corporation contracted with the United States of America for maintenance dredging of the navigation channel in Mobile Bay, Alabama. The corporation's bid for such contract was prepared at its Southern Division office at New Orleans, Louisiana, and was submitted to the United States Corps of Engineers at Mobile, Alabama. Acceptance of said bid was by telegraphic advice from the Corps of Engineers at Mobile to the corporation at New Orleans. The formal contract was executed by the Corps of Engineers at Mobile, and by the corporation at New York. Said contract was the only contract accepted for performance, or performed, in Alabama by Standard Dredging Corporation during the period in question.

"5—The work under said contract consisted of dredging silt from the bottom of the channel and was done between Beacons 24 and 38 in Mobile Bay, as is shown on the maps attached hereto as Exhibits, P 5 and P 6 which was necessary to maintain prescribed navigational depths, and called for the removal of an estimated 3,000,000 cubic yards of material at a unit price of 5.14¢ per cubic yard, or an estimated total price of $154,000. The work began on May 8, 1953 and was completed on June 15, 1953. Only 2,828,312 cubic yards of material were actually dredged, and the total actual contract price was $145,375.34. Prior to, during, and following performance of said work, said navigation channel was used extensively in interstate and foreign commerce.

"6—Work under said contract was subject to the direction and supervision, on behalf of the United States, of the United States Corps of Engineers, which has the responsibility of maintaining, repairing and improving the navigable harbors and waterways of the United States including Mobile Bay.

"7—Performance of said contract was directed and supervised, on behalf of Standard Dredging Corporation, from its division office in New Orleans, Louisiana, where the planning, engineering and administrative work in connection with, and executive and accounting control of, said contract also was done. Standard Dredging Corporation maintained no office or place of business in the State of Alabama during the period in question.

"8—Standard Dredging Corporation executed the work under said contract through the use of its hydraulic suction dredge *Diesel*, her auxiliary vessels, the Tugs *Peter* and *Maryel*, and attendant plant. These vessels were brought to Mobile Bay from Texas, via the Gulf Intracoastal Waterway, on May 7, 1953. At all times while performing said work these vessels were afloat in Mobile Bay, navigating under their own power (the dredge sometimes also being assisted by her auxiliary tugs for facility of movement). On June 17, 1953, after completing the work, said vessels and plant, departed Mobile Bay for the Port of New Orleans, Louisiana via the Gulf Intracoastal Waterway.

"9—The Dredge *Diesel* and her auxiliary vessels, the Tugs *Peter* and *Maryel*, each is of more than twenty tons burden, and each is, and at all times herein mentioned was, enrolled as a vessel of the United States, and licensed by the Bureau of Marine Inspection and Navigation of the Department of Commerce of the United States to engage in the maritime coasting trade. Photostatic copies of the coasting licenses of said vessels, marked exhibits P 1, P 2, and P 3, respectively, are annexed hereto and made part hereof as fully as though set forth *in extenso* herein. During the taxable period in question, said vessels operated on the navigable waters of the United States within the States of Texas, Louisiana, Mississippi, Alabama and Florida.

"10—During the period in question, the only property of Standard Dredging Corporation within the State of Alabama was the Dredge *Diesel*, her auxiliary vessels and attendant plant necessary for the execution of the subject contract. The vessels' crews lived aboard the dredge, in quarters provided for that purpose."

There is no dispute that Mobile Bay, where the dredging work was done, is a part of the territorial waters of the State of Alabama.

The position taken by Standard is (I) that the license tax imposed by § 496, Tit. 51, Code 1940, *supra*, is on the privilege of accepting or making contracts and, as such, may not be exacted "for the privilege of accepting or making a contract with the United States of America under the circumstances" of this case.

Alternatively, it is insisted that, if it should be held that the license tax is directed against the privilege of performing work under contract and not for contracting therefor, the tax as imposed against Standard's activities here involved is invalid (II) "as a direct burden on interstate commerce", and (III) "as an impairment of the exclusive admiralty and maritime jurisdiction of the Congress of the United States, and of the Federal maritime coasting licenses of appellant's vessels."

(I)

We are unable to agree with Standard's insistence that § 496 "purports to levy the tax on the privilege of 'accepting' contracts," and only on such privilege. Accordingly, there is no occasion to discuss the further insistence that the tax "may not be imposed on the privilege of contracting with the United States of America."

Section 496, to the extent here pertinent, provides as follows:

> "§ 496. Construction companies or contractors.—Any person, firm or corporation * * * who shall accept an order for or contract to excavate earth, rock or other material for foundations or any other purpose. * * * shall be deemed a contractor. Every contractor shall procure from the probate judge of the county in which he has his principal office a license to *carry on the business of a contractor*, provided that if such contractor has no such office in this state, then he shall procure such license from the probate judge of the county *where the contract is to be performed*. Every such contractor shall pay a license to be ascertained in the following maner: If the gross amount of all orders or contracts accepted aggregate five thousand dollars and not exceeding ten thousand dollars, he shall pay the sum of ten dollars; * * * if the amount of such orders or contracts exceeds two hundred thousand dollars, two hundred and fifty dollars; and when such contractor shall have obtained a license for

any year for which he has paid a license tax of less than the maximum above prescribed he shall not accept any contract or contracts during such year, the aggregate amount of which exceeds the maximum amount for which his license was obtained, unless and until he shall have paid such additional sum as will make the total license tax paid by him for that year sufficient to cover the aggregate amount of such contract or contracts as prescribed above; and unless he pays such additional sum he shall be deemed to be acting without a license. The payment of the license in one county in the state, as evidenced by the licence or official certificate of the probate judge, shall be sufficient." [Emphasis supplied.]

It is to be noted that § 496 was amended on September 17, 1953 (Act No. 749, Acts 1953, Vol. II, p. 1012), after the license here involved became due and payable. The amendment added the following phrase after the word "ascertained" in the third sentence, viz: "on the basis of the gross amount of all orders or contracts accepted, exclusive of orders, or contracts pertaining to state or county road and bridge projects." The amendment is not applicable here.

We think a fair and reasonable interpretation of § 496, when considered in connection with related statutes and the long-standing administrative interpretation, is that it requires a license on the performance of a contract and not just on its acceptance. The all-prevailing rule is that "a statute is to be construed in accordance with its real intent and meaning, and not

so strictly as to defeat the legislative purpose." *Alabama-Georgia Syrup Co. v. State*, 253 Ala. 49, 52, 42 So. 2d 796. As said in *Touart v. American Cyanamid Co.*, 250 Ala. 551, 555-556, 35 So. 2d 484:

> "* * * We fully recognize the strength of the ingenious and plausible argument of counsel for appellee that the Court is not justified in taking other than the literal language of the statute. But there are instances where this becomes necessary in order to carry out the true legislative intent, which after all is the purpose of the Court. * * * 'A literal interpretation will not be adopted when it would defeat the purpose of a statute, if any other reasonable construction can be given to the words.' * * *"

If the license is on the "acceptance" of a contract only, as insisted by Standard, then anyone contemplating the acceptance of a contract necessarily would have to acquire a license in advance of actual acceptance in order to avoid the penalty prescribed by § 834, Tit. 51, Code 1940. That would be an anomalous situation. Before a contract is formally entered into there can be no assurance that there will ever be a contract. Section 834 makes it unlawful for anyone to "do any act for which a license is required * * * without first having paid for and taken out a license therefor * * *." Section 450, Tit. 51, as amended, also provides that a license must first be procured before engaging in any activity or exercising any privilege requiring a license.

Also, if § 496 should be interpreted as placing a license only on the privilege of "accepting" a contract, the result would be to ascribe to the legislature an intent to encourage the making of contracts outside the state, although to be performed entirely within the state. In other words, parties contracting within the state for work to be done here would be disadvantaged, certainly to the extent of the cost of the license, in competing with non-resident contracting parties. We do not think the legislature intended any such unfair and discriminatory result. Rather, it seems to us, the intention was to require payment of a contractor's license after "acceptance" of a contract, whether that event takes place in this state or elsewhere, but prior to performance of the contract in this state. In other words, the requirement is that a license be paid in advance of the performance of a contract, not before its acceptance, the effect being that the license is on the privilege of performing a contract in this state. It is immaterial whether the contract is accepted or agreed to in this state or elsewhere. For instance, the acceptance of a contract in this state, which is not to be performed here, would not call for a license. Such has been the uniform interpretation and application of the statute by the State Department of Revenue for many years, according to the uncontradicted testimony. See *O'Pry Heating & Plumbing Co. v. State*, 241 Ala. 507, 513, 3 So. 2d 316, where, in discussing what is now § 496, it was said:

> "If the schedule is to apply only to an acceptance of a contract, what about one which is accepted outside of the State, with no power of

the State then to tax it, but it is to be and is later performed in whole or in part in Alabama?

"In line with the conclusion manifest in Sollitt & Sons Const. Co. v. Commonwealth, supra [161 Va. 854, 172 S.E. 290, 91 A.L.R. 774], we perhaps would say that the subsequent performance, in whole or in part, in Alabama would unify the acceptance and performance as one Alabama transaction so as to bring the contractor within the influence of this statute."

Of significance here is the following from *State v. Birmingham Rail & Locomotive Co.*, 259 Ala. 443, 448, 66 So. 2d 884:

"It is an established rule of statutory construction that when a tax statute has been construed by the highest officials charged with the duty of administrating the tax laws, such construction should be given favorable consideration by the courts, especially if such construction has stood unchallenged for a considerable time. State ex rel. Fowler v. Stone, 237 Ala. 78, 185 So. 404; State v. Tuscaloosa Building & Loan Ass'n, 230 Ala. 476, 485, 161 So. 530, 99 A.L.R. 1019. And the weight to be given an administrative interpretation is increased when the legislature, in re-enacting the law, fails to indicate in any way its disapproval of the settled administrative construction. As held in State v. H. M. Hobbie Grocery Co., 225 Ala. 151, 153, 142 So. 46, 47, the re-enactment, without change, of a statute which has been given a uniform construction by the administrative department 'may be treated as a legislative ap-

proval of the departmental construction of the statute, quite as persuasive as the re-enactment of a statute, which has been judicially construed. * * *"

See, also, *State v. Helburn Co.*, 269 Ala. 164, 167, 111 So. 2d 912; *Glencoe Paving Co. v. Graves*, 266 Ala. 154, 158, 94 So. 2d 872; *Ex parte Darnell*, 262 Ala. 71, 82, 76 So. 2d 770.

(II)

Standard contends that, "assuming the incidence of the tax to be as appellee claims, its activities in the performance of the contract in question were in interstate commerce," and for this reason, the license tax is invalid. The argument is that "the work itself—maintenance and improvement of the navigability of an artery of interstate commerce—constituted interstate commerce in the fullest constitutional sense"; that "much of the work—'the planning, engineering and administrative work * * * and executive and accounting control'—was performed at appellant's New Orleans office, from which the work was directed and supervised"; that "the job's mechanical phase (dredging) cannot realistically be separated from its engineering and administrative phases, and that appellant's activities must be treated as one integrated operation in interstate commerce"; that "the measure of the tax sought to be enforced is the total contract price, and appellee has not even attempted to apportion the price between appellant's Alabama operations and its out-of-state activities in the performance of the contract; and a tax

on gross receipts derived from interstate commerce is invalid."

The trial court held the license tax not to be violative of the commerce clause (United States Constitution, Art. 1, § 8, Cl. 3) for the reason that it "was directed at the privilege of the appellant carrying on certain local activities within the State of Alabama." We find no error in this holding. In so concluding we assume, without deciding, that Standard's activities constituted interstate commerce within the meaning of the commerce clause.

Standard places principal reliance on the following from *Michigan-Wisconsin Pipe Line Co. v. Calvert* (Tex. 1954), 347 U.S. 157, 74 S. Ct. 396, 98 L. Ed. 584:

> "It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it. Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 87 (1948); Western Live Stock v. Bureau of Revenue, supra, at 258 [303 U.S. 250, 82 L. Ed. 823, 58 S. Ct. 546, 115 A.L.R. 944.]"

It seems to us that the local activity of performing the contract in Alabama can realistically be separated from the interstate process or flow of commerce [assuming that Standard's overall activities here involved constituted interstate commerce]. The tax incidence is the performance of the contract in the State. It is

not laid upon any other phase of Standard's activities. It is applicable alike to resident and nonresident contractors. There is no discrimination whatever against nonresidents. The performance of the contract admittedly was wholly within Alabama territory, without any possibility of any other state imposing a tax on such performance. We fail to see any unconstitutional burden or discrimination in the application of the license in this case. See *Western Live Stock v. Bureau of Revenue, supra; McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 60 S. Ct. 388, 84 L. Ed. 565, 128 A.L.R. 876; *Caskey Baking Co. v. Commonwealth of Virginia*, 313 U.S. 117, 61 S. Ct. 881, 85 L. Ed. 1223.

Of particular significance is the following from the *McGoldrick* case:

> "Section 8 of the Constitution declares that 'Congress shall have power * * *' to regulate commerce with foreign Nations, and among the several States. * * *' In imposing taxes for state purposes a state is not exercising any power which the Constitution has conferred upon Congress. It is only when the tax operates to regulate commerce between the states or with foreign nations to an extent which infringes the authority conferred upon Congress, that the tax can be said to exceed constitutional limitations. See Gibbons v. Ogden, 9 Wheat. (US) 1, 187, 6 L. Ed. 23, 68; South Carolina Highway Dept. v. Barnwell Bros. 303 US 177, 185, 82 L. Ed. 734, 738, 58 S. Ct. 510. Forms of state taxation whose tendency is to prohibit the commerce or place it at a disadvantage as compared

or in competition with intrastate commerce and any state tax which discriminates against the commerce, are familiar examples of the exercise of state taxing power in an unconstitutional manner, because of its obvious regulatory effect upon commerce between the states.

"But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business, Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254, 82 L. Ed. 823, 826, 58 S. Ct. 546, 115 A.L.R. 944. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress. * * * Nor is taxation of a local business or occupation which is separate and distinct from the transportation or intercourse which is interstate commerce, forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by such business, or is prerequisite to it. Western Live Stock v. Bureau of Revenue, supra (303 U.S. 253, 82 L. Ed. 826, 58 S. Ct. 546, 115 A.L.R. 944) and cases cited.

"In few of these cases could it be said with assurance that the local tax does not in some measure affect the commerce or increase the cost of doing it. But in them as in other in-

stances of constitutional interpretation so as to insure the harmonious operation of powers reserved to the states with those conferred upon the national government, courts are called upon to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed. * * *

"Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidding regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey. Each imposes a burden which intrastate commerce does not bear, and merely because interstate commerce is being done places it at a disadvantage in comparison with intrastate business or property in circumstances such that if the asserted power to tax were sustained, the states would be left free to exert it to the detriment of the national commerce.

"The present tax as applied to respondent is without the possibility of such consequences. Equality is its theme, cf. Henneford v. Silas Mason Co., 300 U.S. 577, 583, 81 L. Ed. 814, 819, 57 S. Ct. 524. It does not aim at or discriminate against interstate commerce. * * *."

> "If, as guides to decision we look to the purpose of the commerce clause to protect interstate commerce from discriminatory or destructive state action, and at the same time to the purpose of the state taxing power under which interstate commerce admittedly must bear its fair share of state tax burdens, and to the necessity of judicial reconciliation of these competing demands, we can find no adequate ground for saying that the present tax is a regulation which, in the absence of Congressional action the commerce clause forbids. * * *"

See, also, *Graves v. State*, 258 Ala. 359, 62 So. 2d 446; *American Bakeries Co. v. City of Opelika*, 229 Ala. 388, 157 So. 206; *Sollitt & Sons Const. Co. v. Commonwealth of Virginia*, 161 Va. 854, 172 S.E. 290, 91 A.L.R. 774, appeal dismissed 54 S. Ct. 632, 292 U.S. 599, 78 L. Ed. 1463, rehearing den. 54 S. Ct. 714, 292 U.S. 604, 78 L. Ed. 1466.

In *Graves v. State, supra*, the license involved was imposed on a transient photographer. What was there said is also pertinent here, viz:

> "* * * When a photographer comes into the State, or resides in the State, and moves about in it from place to place, pursuing his profession, he is an itinerant. Shiff v. State, supra. He is then in Alabama rendering some of the essentials of the art of photography as a business, the same as if he had a fixed location here. It is not necessary to perform all the essentials of the art in Alabama to constitute one a photographer subject to license as such

in Alabama. The performance of an important feature of it in Alabama is justification for exercising the licensing power. Standard Oil Co. v. City of Selma, 216 Ala. 108, 112 So. 532; Sanford Service Co. v. City of Andalusia, supra. The distinction between such a situation and that of drummers soliciting and procuring sales to be consummated by interstate shipments has been narrowly drawn in express terms, as we have shown. The principle of the drummers' license cases has not been extended by the United States Supreme Court to a situation where there was locally performed an essential physical act in the performance of a transaction and where the license was directed solely at that local activity, and where it is not laid on interstate transportation nor is an undue burden upon it."

(III)

Standard's very limited argument that imposition of the license tax impairs the Federal maritime coasting licenses of its vessels leaves us unimpressed. The insistence is that "no state has the power to impose a condition precedent (i.e., a license tax) to the exercise of these federal licenses."

In the first place, the tax is not directed at the vessels or their operation; nor does it impair or affect the movement of said vessels. The tax incidence, as already discussed, is performance of the contract. The levy is not upon the means or machinery employed in doing the work. If Standard's vessels with maritime

coasting licenses were used, such was by choice of Standard. Their incidental use in performing the contract cannot insulate Standard from the privilege license tax laid on such performance.

Another reason why Standard's argument is not well-taken is thus epitomized in *Standard Dredging Corporation v. Murphy*, 319 U.S. 306, 308, 63 S. Ct. 1067, 87 L. Ed. 1416:

> "* * * The added contention that a vessel's federal license may bar state taxation is only another form of the argument that the tax burdens interstate commerce, * * *."

We have already concluded that the license tax is not an unconstitutional burden on interstate commerce. In each of the cases relied on by Standard (*Moran v. City of New Orleans*, 112 U.S. 69, 5 S. Ct. 38, 28 L. Ed. 653; *Harmon v. City of Chicago*, 147 U.S. 396, 13 S. Ct. 306, 38 L. Ed. 216; *Sinnot v. Davenport*, 63 U.S. 227, 22 How. 227, 16 L. Ed. 243; *Foster v. Davenport*, 63 U.S. 244, 22 How. 244, 16 L. Ed. 248) the tax was laid directly on the vessels or their operation. Such is not the situation now before us. Cf. *Huron Portland Cement Company v. City of Detroit*, 362 U.S. 440, 80 S. Ct. 813, 4 L. Ed. 2d 852, which held Detroit's Smoke Abatement Code, as applied to ships owned by the Cement Company and operated in interstate commerce, to be constitutional. It was there said:

> "An additional argument is advanced, however, based not upon the mere existence of the federal inspection standards, but upon the fact

that the appellant's vessels were actually licensed, 46 U.S.C. § 263, and enrolled, 46 U.S.C. §§ 259-260, by the national government. It is asserted that the vessels have thus been given a dominant federal right to the use of the navigable waters of the United States, free from the local impediment that would be imposed by the Detroit ordinance.

"The scope of the privilege granted by the federal licensing scheme has been well delineated. A state may not exclude from its waters a ship operating under a federal license. Gibbons v. Ogden, 9 Wheat. 1. A state may not require a local occupation license, in addition to that federally granted, as a condition precedent to the use of its waters. Moran v. New Orleans, 112 U.S. 69. While an enrolled and licensed vessel may be required to share the costs of benefits it enjoys, Huse v. Glover, 119 U.S. 543, and to pay fair taxes imposed by its domicile, Transport Co. v. Wheeling, 99 U.S. 273, it cannot be subjected to local license imposts exacted for the use of a navigable waterway, Harman v. Chicago, 147 U.S. 396. See also Sinnot v. Davenport, 22 How. 227.

"The mere possession of a federal license, however, does not immunize a ship from the operation of the normal incidents of local police power, not constituting a direct regulation of commerce. Thus, a federally licensed vessel is not, as such, exempt from local pilotage laws, Cooley v. Board of Wardens of Port of Philadelphia, 12 How. 299, or local quarantine laws, Morgan v. Louisiana Board of Health, 118 U.S. 455, or local safety inspections, Kelly v Wash-

> ington, 302 U.S. 1, or the local regulation of wharves and docks, Packet Co. v. Catlettsburg, 105 U.S. 559. Indeed this Court has gone so far as to hold that a state, in the exercise of its police power, may actually seize and pronounce the forfeiture of a vessel 'licensed for the coasting trade, under the laws of the United States, while engaged in that trade.' Smith v. State of Maryland, 18 How. 71, 74. The present case obviously does not even approach such an extreme, for the Detroit ordinance requires no more than compliance with an orderly and reasonable scheme of community regulation. The ordinance does not exclude a licensed vessel from the Port of Detroit, nor does it destroy the right of free passage. We cannot hold that the local regulation so burdens the federal license as to be constitutionally invalid."

The decree appealed from is due to be affirmed. So ordered.

This case was submitted on briefs and assigned to two other Justices, successively, in the order of their ascendancy to the bench. It was assigned to the writer on January 11, 1960, for study and preparation of the opinion.

Affirmed.

Livingston, C. J., Lawson, Stakely, Merrill and Coleman, JJ., concur.

Judgment of the Supreme Court of Alabama

Come the parties by Attorneys, and the record and matters therein assigned for errors, being submitted on briefs in lieu of oral argument, and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court, In Equity, there is no error.

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED, AND DECREED that the decree of the Circuit Court, In Equity, appealed from be and is hereby in all things affirmed.

IT IS FURTHER CONSIDERED, ORDERED, AND ADJUDGED that the appellant, Standard Dredging Corporation, and Maryland Casualty Company, surety on the appeal bond, pay the costs of appeal of this Court and of the Circuit Court, in Equity, for which costs let execution issue accordingly.

Decree of the Circuit Court

This cause having come on to be heard and submitted first on the demurrer of the Appellee, and the Court having considered the demurrer is of the opinion that same should be overruled.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the demurrer of the Appellee to the Bill of Complaint be and same is hereby overruled.

This cause was also submitted on the same day for final decree on the Bill of Complaint of the Appellant, the answer of the Appell e, a stipulation entered into by the parties, the oral testimony of witnesses taken before the Court, and the exhibits introduced by both parties. The Court having considered and understood same, together with the contentions made by the parties in the pleadings, and in their briefs, is of the opinion that the contractors' license levied under Title 51, Section 496, Code of Alabama 1940, as amended, against the Appellant for the license year beginning October 1, 1952 and ending September 30, 1953, and as applied to the Appellant in this case, did not violate or abridge in any respect the commerce clause of the Federal Constitution. The license tax as so applied, was directed at the privilege of the Appellant carrying on certain local activities within the State of Alabama; namely, executing the contract involved in this state by dredging that portion of the land underneath the surface of Mobile Bay lying between Beacon 24 and Beacon 38, in accordance with a map of Mobile Bay, Alabama, prepared by the United States Corps of Engineers, Mobile, Alabama. That under the circumstances it appears that Appellant was correctly cited by the state for the license tax for said fiscal year, and that the final assessment made by the Department of Revenue against the Appellant in this cause, was validly made and should be affirmed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the final assessment of license tax made by the State Department of Revenue

against the Appellant under the provisions of Section 496, as amended, supra, on July 29, 1954, and covering the license year beginning October 1, 1952 and ending September 30, 1953, and in the total amount of $273.13, was validly and correctly made, and that same should be, and is hereby affirmed, and the costs in this cause are also hereby taxed against the Appellant.

IT IS FURTHER ORDERED AND DECREED that the amount of $273.13 which the Appellant has paid to the state under protest and in lieu of making a supersedeas bond in this appeal, be paid and covered into the proper funds, in satisfaction of said claim, and that execution may be issued for the collection of the costs in this cause if same have not been paid within thirty days.

State Statute Involved

Chapter 20, Title 51, Code of Alabama:

Section 496. Any person, firm or corporation accepting orders or contracts for doing any work on or in any building or structure, requiring the use of paint, stone, brick, mortar, wood, cement, structural iron or steel, sheet iron, galvanized iron, metallic piping, tin, lead, electric wiring, or other steel, or any other building material, or shall accept contracts to do any paving or curbing on sidewalks or streets, public or private property, using asphalt, brick, stone, cement, wood or other composition, or who shall accept an order for or contract to excavate earth, rock or other material for

foundations or any other purpose, or who shall accept an order or contract to construct any sewer of stone, brick, terra cotta, or other material, or shall accept a contract to construct highways, bridges, dams, or railroads, shall be deemed a contractor. Every contractor shall procure from the probate judge of the county in which he has his principal office a license to carry on the business of a contractor, provided that if such contractor has no such office in this state, then he shall procure such license from the probate judge of the county where the contract is to be performed. Every such contractor shall pay a license to be ascertained on the basis of the gross amount of all orders or contracts accepted, exclusive of orders or contracts pertaining to state or county road and bridge projects, as follows:

If the gross amount of all orders or contracts accepted aggregate five thousand dollars and not exceeding ten thousand dollars, he shall pay the sum of ten dollars; if the amount of such orders or contracts is more than ten thousand dollars and does not exceed twenty thousand dollars, fifteen dollars; if the amount of such orders or contracts exceeds twenty thousand dollars and does not exceed fifty thousand dollars, twenty-five dollars; if the amount of such orders or contracts exceeds fifty thousand dollars and does not exceed one hundred thousand dollars, fifty dollars; if the amount of such orders or contracts exceeds one hundred thousand dollars and does not exceed one hundred and fifty thousand dollars, one hundred and fifty dollars; if the amount of such orders or contracts exceeds one hundred and fifty thousand dollars and

does not exceed two hundred thousand dollars, two hundred dollars; if the amount of such orders or contracts exceeds two hundred thousand dollars, two hundred and fifty dollars; and when such contractor shall have obtained a license for any year for which he has paid a license tax of less than the maximum above prescribed he shall not accept any contract or contracts during such year, the aggregate amount of which exceeds the maximum amount for which his license was obtained, unless and until he shall have paid such additional sum as will make the total license tax paid by him for that year sufficient to cover the aggregate amount of such contract or contracts as prescribed above; and unless he pays such additional sum he shall be deemed to be acting without a license. The payment of the license in one county in the state, as evidenced by the license or official certificate of the probate judge, shall be sufficient.

FILE COPY

Office-Supreme Court, U.S.
FILED
SEP 15 1960
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1960

No. 332

STANDARD DREDGING CORPORATION,
Appellant

versus

STATE OF ALABAMA,
Appellee

On Appeal from the Supreme Court of Alabama

MOTION TO DISMISS AND MOTION TO AFFIRM

MacDonald Gallion,
Attorney General for
Alabama

Guy Sparks, Executive
Assistant to the Commissioner
of Revenue, and Special
Assistant Attorney General.

William H. Burton, Counsel,
Revenue Department, and
Assistant Attorney General

Counsel for the Appellee

Supreme Court of the United States

OCTOBER TERM, 1960

No. 332

STANDARD DREDGING CORPORATION,
Appellant

versus

STATE OF ALABAMA,
Appellee

On Appeal from the Supreme Court of Alabama

MOTION TO DISMISS AND MOTION TO AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment and decree of the Supreme Court of Alabama in this cause be affirmed on the ground that the questions which are presented in the "Jurisdictional Statement" of the Appellant are so unsubstantial as not to warrant further argument.

Motion is made to dismiss and affirm also on the ground that there are no substantial federal questions presented, in that the questions raised in the lower courts were clearly of local

concern, as the license tax which is the subject of this litigation was directed at local activities which took place within the State of Alabama, namely, the performance of a contract within the State of Alabama. It is the license tax required of all contractors in Alabama who do any of the work in this State described in the taxing statute.

Opinions Below

This is an appeal from a judgment and decree entered by the Supreme Court of Alabama on June 30, 1960, in favor of the Appellee and against the Appellant. The opinion of the Supreme Court together with the judgment and decree of said court are to be found in the Appendix of the Appellant's "Jurisdictional Statement" and on pages 11-31 of the Jurisdictional Statement. The opinion of the Supreme Court of Alabama actually constitutes in itself an excellent brief in support of the Appellee's Motions to Dismiss and to Affirm. The decree of the Circuit Court of Montgomery County, Alabama, In Equity, the Court of first instance, was also in favor of the Appellee, and is to be found on pages 31-33 of the "Jurisdictional Statement," and in the Appendix thereto.

We disagree with the Appellant in its statement to the effect that the Circuit Court rendered no opinion. The Circuit Court did render an opinion, but the opinion was very terse and to the point (R. p. 97), and is, as follows:

> "The Court having considered and understood same, together with the contentions made by the parties in the pleadings, and in their briefs, is of the opinion that the contractors' license levied under Title 51, Section 496, Code of Alabama 1940, as amended,

against the Appellant for the license year beginning October 1, 1952 and ending September 30, 1953, *and as applied to the Appellant in this case, did not violate or abridge in any respect the commerce clause of the Federal Constitution. The license tax as so applied, was directed at the privilege of the Appellant carrying on certain local activities within the State of Alabama; namely, executing the contract involved in this state by dredging that portion of the land underneath the surface of Mobile Bay lying between Beacon 24 and Beacon 38, in accordance with a map of Mobile Bay, Alabama*, prepared by the United States Corps of Engineers, Mobile, Alabama. That under the circumstances it appears that Appellant was correctly cited by the state for the license tax for said fiscal year, and that the final assessment made by the Department of Revenue against the Appellant in this cause, was validly made and should be affirmed." (*Emphasis supplied.*)

This holding of the Circuit Court was affirmed in every respect by the Supreme Court of Alabama. (Jurisdictional Statement, Appendix, pages 11-33.)

Jurisdiction

It clearly appears that there is no question of interstate commerce or other federal question involved in this case in that the tax involved was levied and directed at a purely local business activity (the performance of the contract) which took place within the State of Alabama; thus it is respectfully submitted that this Court has no jurisdiction to entertain this appeal except to dismiss same or to affirm the decree and judgment of the State Supreme Court.

The tax involved is levied on all contractors who do any of the work described under Title 51, Chapter 20, Article 1,

Section 496, as amended, Code of Alabama 1940, and has been repeatedly held by the Supreme Court of Alabama to apply mainly, if not entirely, to the privilege of a contractor performing a contract within the State of Alabama,[1] and not to be directed at any of the events which might take place without the State of Alabama.

Statute Involved

The statute involved is Title 51, Chapter 20, Article 1, Section 496, as amended, Code of Alabama 1940, which levies a license tax on all contractors who perform work in Alabama of the nature described in the statute, and has been repeatedly held by the Supreme Court of Alabama to be on the privilege of such a contractor performing a contract within the State of Alabama. The Appellant has included the text of this statute in its Jurisdictional Statement, Appendix, pages 33-35.

Question Presented

The Supreme Court of Alabama without a dissenting opinion affirmed the decree of the lower court in holding that the taxing statute involved as applied to the Appellant in this case, did not violate or abridge in any respect the Commerce Clause of the Federal Constitution, in that the tax as so applied, was directed at the privilege of the Appellant carrying on certain local activities within the State of Alabama, namely, performing the contract involved in this state. We disagree with the

---

[1] *Standard Dredging Corporation v. State of Alabama, decided by Alabama Supreme Court June 30, 1960, not as yet reported (Jurisdictional Statement, Appendix, pages 11-31), Brown Plumbing Company v. McDowell, 240 Ala. 485, 200 So. 104, O'Pry Heating and Plumbing Company v. State of Alabama, 241 Ala. 507, 3 So. 2d 316.*

Appellant then that there is a substantial question involved or that there are substantial federal questions involved under the Commerce and Admiralty Clauses of the Federal Constitution. This state tax is not directed at the equipment used in performing the work under the contract, or the privilege of using such equipment in this state (the equipment used is entirely immaterial; no mention is made at all of equipment in the taxing statute). The lower court has clearly construed the taxing statute to apply only to the privilege of executing the contract by performing the work called for thereunder in the state.

The Facts

We agree that the Appellant is a New Jersey corporation, having its principal office in New York City, and that it has no regular place of business within the State of Alabama. The Appellant voluntarily came into the State of Alabama and voluntarily qualified with the Secretary of State to do business in Alabama, and paid franchise taxes to the State of Alabama for the privilege of doing business in Alabama for the period of time material to this suit. Moreover, the Appellant voluntarily procured a regulatory license from the Alabama Contracting Board, which is a regulatory body created under the police powers of this state, and which has nothing whatsoever to do with the taxing statute involved in this case or the enforcement thereof, but is entirely an independent agency. (R. pp. 20-21.)

The fact, however, remains that the Appellant was qualified to do business in Alabama, and was also licensed under its regulatory laws to practice general contracting in Alabama, at

all times pertinent to this suit. Its actions in this respect were of its own volition. (R. pp. 20-21.)

On April 29, 1953, Appellant contracted with the Department of the Army, Corps of Engineers, Mobile District, Mobile, Alabama, to remove the earth and all other material from the bottom of Mobile Bay lying above the plane of 34 feet below mean low tide, over a bottom-width of 200 feet and an overwidth strip of 20 feet along the west edge of the 200-foot channel from Station No. 38 to approximately Station No. 24, and with an overall total distance to be dredged and excavated of about 56,245 feet, for the consideration named in the contract. (R. pp. 45-46.) While the contract in the first instance was prepared by the Corps of Engineers at Mobile, Alabama, it was sent to the Appellant's New Orleans office, and thence transmitted to its New York office where it was signed by one or more of its officials, and was then returned to the Corps of Engineers at Mobile, Alabama where it was approved and signed by the District Engineer. (R. p. 28.) It will be noted by examining this "contract for construction," which appears on pages 46-87, inc., of the Record, that it covers only excavating and dredging operations as to a portion of the bottom of Mobile Bay. It does not in any respect designate or describe the equipment with which the contract was to be performed, and leaves the matter of the equipment to be used entirely up to the contractor. Thus, importance was given to the excavating work to be performed under the contract, and not in any respect to the equipment or type of equipment which was to be used in doing the work called for under the contract.

The Appellant through its Counsel admitted that Mobile Bay is within the territorial jurisdiction of Alabama, and that the

actual work under the contract was performed by it in Alabama by dredging and excavating earth and other materials from the bottom of Mobile Bay from Station 38 southward to Station 24, as is shown on the map prepared by the United States Corps of Engineers, Mobile, Alabama. (Exhibits 5 and 6, R. p. 21.) The evidence then is undisputed that such excavation and dredging work was performed under the contract by the Appellant entirely within the State of Alabama. (R. pp. 25 and 28.)

The contractors license tax, levied against the Appellant in this case under the provisions of Title 51, Chapter 20, Article 1, Section 496, as amended, Code of Alabama 1940, has continuously been construed by the Supreme Court of Alabama to be directed at the performance of the contract, in whole or in part, in Alabama, or at the privilege of performing the contract within the State. (See Jurisdictional Statement, Appendix, pages 16-21.) The evidence also shows without contradiction that the State Department of Revenue has also as a matter of administrative construction of the taxing statute applied it only to cases where the contractor does the work or performs the contract, in whole or in part, within the State of Alabama. (R. pp. 31-33, inc., Jurisdictional Statement, Appendix, pages 19-21.)

The license tax statute, namely, Section 496, as amended, supra, does not levy in any respect a tax on equipment or the privilege of using any type of equipment in Alabama. In this respect, and insofar as is pertinent to the situation in this case, the license statute mentions only contracts, ***"to excavate earth, rock or other material for foundations or for any other purpose"***. This statute also provides that where a contractor

has no office in this state, "then he shall procure such license from the Probate Judge of the county where the contract *is to be performed*". (See Text of Statute, Jurisdictional Statement, Appendix, pages 33-35.) We also reiterate in this connection that not even the "contract for construction" involved in this case requires that the contractor use any designated or specific type of equipment, nor does it give any importance to the type of equipment to be used by the contractor. Thus, the choice and selection of the equipment to be used in performing the contract is left entirely up to the contractor.

No attempt has been made by the State to license or tax in any respect the dredges or the tug boats used by the Appellant to tow the dredges from place to place. A reading of the text of the taxing statute (Jurisdictional Statement, Appendix, pp. 33-35) will plainly show that neither the levy nor the measure of the tax touches any of the equipment used by the contractor.

The Question is not Substantial

The Circuit Court in this case clearly held that the contractors license tax (a tax levied by the state on all contractors who perform any of the work in this state described in the taxing statute) levied under Title 51, Chapter 20, Article 1, Section 496, as amended, Code of Alabama 1940, as applied to the Appellant in this case:

> ". . . did not violate or abridge in any respect the Commerce Clause of the Federal Constitution. ***The license tax as so applied was directed at the privilege of the Appellant carrying on certain local activities within the State of Alabama; namely, executing the contract in this state by dredging that portion of the land underneath the surface of Mobile Bay, lying***

between Beacon 24 and Beacon 38, in accordance with a map of Mobile Bay, Alabama, prepared by the United States Corps of Engineers, Mobile, Alabama." (Emphasis supplied.)

This not only appears to have answered all questions of any consequence in the case, but also serves to define what might be considered as the material issues.

Section 496, as amended, of Title 51, Code of Alabama 1940, confines its levy insofar as the statute is pertinent to this case to the privilege of the contractor performing a contract in this state, in whole or in part, "to evacate earth, rock or other material for foundations or any other purpose". (Jurisdictional Statement, Appendix, pp. 33-34.)

The Supreme Court of Alabama has consistently construed the taxing statute to be directed at the execution or the performance of the work called for under the contract. In this respect, the State Supreme Court has refused to allow the taxing statute to be applied in cases involving only the negotiations leading up to the making of a contract or the mere signing of a contract, *unless the work under the contract was also performed in Alabama in whole or in part. Standard Dredging Corporation v. State of Alabama*, (Jurisdictional Statement, Appendix, pp. 11-30), *O'Pry Heating and Plumbing Company v. State*, 241 Ala. 507, 3 So. 2d 319 (1941), and *Brown Plumbing and Heating Company v. McDowell*, 240 Ala. 485, 200 So. 104, (1941).

> "We think a fair and reasonable interpretation of Section 496, when considered in connection with related statutes and the long standing administrative

> interpretation, *is that it requires a license on the performance of a contract and not just its acceptance.*" *(Emphasis supplied.) Standard Dredging Corporation v. State of Alabama,* (Jurisdictional Statement, Appendix, p. 17.)

In the case of *Spector Motor Service v. O'Connor,* 304 U.S. 602, 608, 71 S. Ct. 508, 512, and in other cases, this Court has given considerable weight to the interpretation of the state statute by the highest Court of the State involved.

> "Answer in the instant case has been made clear by the courts of Connecticut. It is not a matter of labels. The incidence of the tax provides the answer." 304 U. S. 608, 71 S. Ct. 512.

This taxing statute then has been held by the highest Court in Alabama to be directed at the privilege of the contractor performing the work called for under the contract, in whole or in part, within the State of Alabama. Therefore, as applied in this case, it is said to be directed at the local activity and privilege of the contractor performing the contract within the State by removing the earth, rock, and other material from the land underneath Mobile Bay to the extent called for under the contract. It is true that some of the negotiations leading up to the signing of the contract took place in other states, and that the contract was actually signed on the part of Standard in New York. The contract was not finally accepted though until it was returned to Mobile, Alabama and signed there by the District Engineer. Some of the necessary paper work was done in New Orleans. These things, however, in accordance with interpretation placed on the taxing statute by the Supreme Court of Alabama are not the things at which the tax is directed. The activity at which the tax is directed has been held to

be the performance of the contract in whole or in part within the State of Alabama. The evidence is undisputedly to the effect that from a physical standpoint the work under the contract was performed entirely within the State of Alabama. (R. pp. 26, 28, and 45-46.)

The Alabama Court also clearly deems the performance of the contract and the work done thereunder wholly within the State, a sufficient nexus, separate and apart from the Appellant's other activities, at which the tax can be validly directed, and within the sphere of the taxing powers of the State. This conclusion on the part of the Alabama Court also appears to be fully in accord with the majority of the decisions of this Court.

> "The state is not precluded from imposing taxes upon other activities or aspects of this business, which unlike the privilege of doing interstate business, are subject to the sovereign power of the State. Those taxes may be imposed although their payment may come out of the funds derived from the petitioner's interstate business, provided that their tax is so imposed that their burden will be reasonably related to the powers of the State and nondiscriminatory."
>
> *Spector Motor Service v. O'Connor*, 304 U.S. 602, 609, 71 S. Ct. 508, 512.

Also see *Northwestern States Portland Cement Company v. State of Minn.*, 353 U. S. 450, 79 S. Ct. 357.

Interstate Oil Pipe Line Company v. Stone, 337 U. S. 662, 69 S. Ct. 1264.

Memphis Natural Gas Company v. Stone, 335, U. S. 80, 68 S. Ct. 1475.

Central Greyhound Lines, Inc. V. Mealey, 334 U. S. 653, 68 S. Ct. 1260.

Caskey Baking Company v. Commonwealth of Virginia, 313 U. S. 117, 61 S. Ct. 883.

Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 58 S. Ct. 546.

Scripto, Inc. v. Carson, (Decided March 21, 1960), 80 S. Ct., 619.

This appears to be clearly a case where the tax is directed at a local activity which takes place entirely within the taxing state, and certainly one that can be readily separated from the Appellant's other activities, and so-called interstate activities. This Court has repeatedly upheld the right of a state to tax such local activities. *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 58 S. Ct. 546, *Scripto, Inc. v. Carson*, (Decided March 21, 1960), 80 S. Ct. 619, among a number of others.

> "It seems to us that the local activity of performing the contract in Alabama can realistically be separated from the interstate process or flow of commerce [assuming that Standard's overall activities here involved constituted interstate commerce]. The tax incidence is the performance of the contract in the State It is not laid upon any other phase of Standard's activities. It is applicable alike to resident and nonresident contractors. There is no discrimination whatever against nonresidents. The performance of the contract admittedly was wholly within Alabama territory, without any possibility of any other state imposing a tax on such performance We fail to see any unconstitutional burden or discrimination in the application of the license in this case. "See Western Live Stock v. Bureau of Revenue, supra; McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 60 S. Ct. 388, 84 L. Ed. 565, 128 A.L.R. 876; Caskey Baking Co. v. Commonwealth of Virginia, 313 U.S. 117, 61 S. Ct. 881, 85 L. Ed. 1223."

See decision of Alabama Supreme Court, Jurisdictiona. Statement, Appendix, pp. 22 and 23.

The foregoing represents the interpretation by the Supreme Court of Alabama of this local law and the facts as found by that Court upon which it founded its judgment.

This Court in one of its latest decisions, namely, *Scripto, Inc. v. Carson*, (Decided March 21, 1960), 80 S. Ct. 619, 621, said this in regard to such a construction by a State Court of its local laws:

> "The application by that court of its local laws and the facts on which it founded judgment are of course controlling here. General Trading Co. v. State Tax Comm., 1944, 322 U.S. 335, 337, 64 S. Ct. 1028, 1029, 88 L. Ed. 1309."

Navigable Waters

The question has been well settled, since the inception of this Union that the title to and right of control of the soil under tidal and navigable waters are in the several states, where such waters are within their territories, subject to the right of the Congress and the Federal Government to regulate commerce and navigation on such waters. *Oklahoma v. Texas*, 258 U.S. 574, 42 S. Ct. 406, *Seattle v. Oregon & W. R. Co.*, 255 U.S. 56, 41 S. Ct. 237, *Borax Consolidated v. Los Angeles*, 296 U.S. 10, 56 S. Ct. 23, Rehearing Denied in 296 U.S. 664, 56 S. Ct. 304. 56 Am. Jur., Sections 241 and 453, pp. 698 and 865. The soil under Mobile Bay and the waters themselves are as much a part of the State of Alabama and within its territorial jurisdiction as Bienville Square in the City of Mobile or the Court House in Birmingham, subject only to the rights of the Federal Government to control commerce and navigation on such waters. The fact that the Federal Government has the

right to control navigation and commerce on Mobile Bay certainly does not mean that it is not still a part of the State of Alabama, or that the State has ceded exclusive jurisdiction over such territory to the Federal Government. The State still retains the right to tax on its said territory and to assert certain controls thereover relating to conservation and otherwise. *Howard v. Commissioners of Sinking Fund*, 344 U.S. 624, 73 S. Ct. 465.

The fact then that in the case of *Ritch v. Puget Sound Bridge & Dredging Co.*, 156 F. 2d 334, the Circuit Court of Appeals for the Ninth Circuit has for the purpose of the Federal Fair Labor Standard Act held that employees of a company dredging or doing other work on the navigable waters within the territory of a State were engaged in interstate commerce for the purpose of the Wage and Hour Laws, would clearly not deprive the State from taxing or asserting jurisdiction and certain controls on its said territory. The State would still clearly have such jurisdiction thereover, unless it had ceded all of its jurisdiction in this respect to the Federal Government. This certainly has not happened in the case of Mobile Bay. *Huron Portland Cement Company v. City of Detroit*, 362 U.S. 440, 80 S. Ct. 813, and *Howard v. Commissioners of Sinking Fund*, 344 U.S. 624, 73 S. Ct. 465.

The Federal License

The Appellant's argument in this respect indeed seems far fetched. An examination of Title 51, Chapter 20, Article 1, Section 496, as amended, Code of Alabama 1940, will clearly disclose that this taxing statute does not in any respect levy or attempt to levy a license or any other type of tax on the

Appellant's dredges and tug boats or any other equipment which might have been used by the Appellant in performing the contract within the State of Alabama. The license tax involved is levied upon and directed at the privilege of performing a contract within the State of Alabama, without any significance being given whatsoever to the type of equipment or as to what equipment is used by the contractor. Whether the Appellant used tug boats which were licensed and registered by the Federal Government in doing this work in Alabama is entirely immaterial insofar as the levy made under the taxing statute is concerned. Even by the wildest stretch of the imagination it is hard to see how this taxing statute could in any respect interfere with or impair the federal licenses and registrations as to these tug boats. *Huron Portland Cement Company v. City of Detroit*, 362 U.S. 440, 80 S. Ct. 813. The Supreme Court of Alabama in its opinion rendered in this case has clearly answered the Appellant's argument in this respect. See Jurisdictional Statement, Appendix, pp. 27-30.

We respectfully submit, therefore, that the Appellant presents no substantial question for the decision of this Court, and that the judgment and decree of the State Court should be affirmed or in the alternative this appeal be dismissed.

MacDONALD GALLION, Attorney General for Alabama

GUY SPARKS, Special Assistant Attorney General for Alabama

Of Counsel for Appellee

WILLIAM H. BURTON, Assistant Attorney General for the State of Alabama

Counsel for Appellee

Proof of Service

We, MacDonald Gallion and William H. Burton, two of the Attorneys for the Appellee, State of Alabama, in this cause, hereby certify that on the _____ day of September, 1960, we served copies of the foregoing motion to affirm or motion to dismiss on Honorable Eberhard P. Deutsch, Deutsch, Kerrigan & Stiles, Hibernia Bank Building, New Orleans 12, Louisiana, as Counsel for the Appellant, Standard Dredging Corporation, by mailing a copy of same to him in a duly addressed envelope, with first class postage prepaid, United States mail.

MacDONALD GALLION, Attorney General for Alabama

WILLIAM H. BURTON, Assistant Attorney General for Alabama, 201 Administrative Building, Montgomery, Alabama

Counsel for the Appellee